IP 03-0260-C K/H Morton v D-Z Investments
Magistrate Tim A. Baker Signed on 7/22/04

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHNEY MORTON,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:03-cv-00260-TAB-DFH
	)	
D-Z INVESTMENTS, LLC,,	)	
	)	
Defendant.	)	

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JOHNEY MORTON,	)	
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Plaintiff,	)	
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vs.	)	1:03-cv-0260-TAB-DFH
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D-Z INVESTMENTS, LLC,	)	
	)	
Defendant.	)	

ENTRY ON SUMMARY JUDGMENT AND OTHER MOTIONS

I. Introduction.

Claiming racial harassment and discrimination, Johney Morton resigned his employment with International Metals Processing ("IMP")[1] and filed this lawsuit pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. As this suit progressed, Morton and his counsel missed several Court-ordered deadlines, as well as a pretrial conference. In addition, throughout this litigation, Morton's counsel, John Moss, Jr., misrepresented to the Court and to defense counsel the whereabouts of his client. These deficiencies resulted in a flurry of motions that are ripe for disposition, including D-Z's motion for summary judgment to which Morton belatedly responded. Many of these motions shift this Court's attention away from the merits of the case. Ultimately, however, the Court

[1]The parties do not identify what the relationship is between IMP and D-Z Investments, LLC. Regardless, there appears to be no dispute that IMP and D-Z Investments, at least for purposes of this lawsuit, are one and the same. Accordingly, to avoid confusion, the Court refers to the Defendant as either "IMP" or "D-Z."

determines that D-Z is entitled to judgment as a matter of law, and that Plaintiff's counsel should be sanctioned.

II. Background.

A. Factual Background.[2]

IMP hired Morton in October 1996 as a machine operator. [Compl., ¶ 1; Answer ¶ 1; Def.'s Ex. 6]. Within a year after his employment began, Morton's coworkers subjected him to racially insensitive or derogatory remarks. For example, shortly after Morton moved to Indiana, a coworker named "Nick" told Morton that Morton did not want to live in Mooresville because "[t]hey're still lynching black people out there." [Morton Dep., p. 104]. Morton does not recall reporting the comment to IMP's management. [Morton Dep., p. 109].

Thereafter, in 1996 or 1997, "Nick" hit Morton across his back with a piece of metal banding while yelling "this is how we used to do it in the olden days." [Morton Dep., pp. 101-02]. Morton immediately reported the incident to Mark Desmond, IMP's president. Desmond investigated the incident and, as a result, held a group meeting of employees to explain the company's policy on harassment and to allow Morton to address the group. [Morton Dep., p. 104; Desmond Aff., ¶ 10]. After the meeting, "Nick" did not make any further racial slurs toward Morton. [Morton Dep., p. 136].

In 2000, copper had been reported missing from IMP's facility. [Morton Dep., p. 109]. As

[2]The facts are either undisputed or viewed in a light most favorable to Morton, the non-moving party on summary judgment. In addition, this background section is a brief overview of the facts and is not meant to be an exhaustive recitation of all material facts in this case.

part of its investigation into the incident, the State Police interviewed everyone on the second shift, including the shift supervisor. [Desmond Aff., ¶ 11]. According to Desmond, the police believed that the copper was stolen during IMP's second shift and that "whoever stole the copper had an accomplice who might be working on second shift." [Desmond Aff., ¶ 11]. Morton, at the time, worked on first shift and, apparently, took offense to his questioning. [Morton Dep., p. 112]. Morton asked Desmond why he was questioned by the police, and Desmond responded that he believed all "you guys" or "you people" hung out together. [Morton Dep., p. 112]. Morton believed Desmond was referring to his race. [Morton Dep., p. 112]. Eventually, the police arrested Chris Adair, a former IMP employee, in connection with the copper theft. Morton had worked with Adair in the past. [Morton Dep., p. 116].

On April 16, 2001, IMP promoted Morton to the second shift working foreman position. [Desmond Aff., ¶ 5; Clemons Aff., ¶ 4; Clemons Aff., Ex. A]. As a result of the promotion, Morton received a shift differential as well as a $225 per month management stipend. [Morton Dep., p. 68; Clemons Aff., ¶ 4; Desmond Aff., ¶ 6]. Morton remained the second shift working foreman for approximately three to four months. [Morton Dep., p. 70]. At that time, IMP discontinued the second shift because of poor business. [Desmond Aff., ¶ 7; Morton Dep., p. 70]. Therefore, Morton returned to first shift as an assistant machine operator. At the time of Morton's return to first shift, all the machines had operators. [Morton Dep., pp. 70-72]. Morton did not receive a pay cut as a result of his return to first shift. Additionally, IMP paid Morton his monthly management stipend until "approximately February 2002." [Desmond Aff., ¶ 8; Morton p. 72].

In or around the fall of 2001, Morton experienced additional racially derogatory remarks at the

hands of his coworkers. While in the employee washroom, Lawrence Smith, Sr. stated to Morton, "[h]ey, boy, get over here and let me see if I can wipe some of that black off your face." [Morton Dep., p. 127; Desmond Aff., ¶ 12; Desmond Aff., Ex. B]. Morton complained to his supervisor, Doug Harris, regarding the offensive nature of Smith, Sr.'s statement. Harris, in turn, instructed Morton to talk with Desmond. [Morton Dep., p. 128]. Also around this time, Lawrence Smith, Jr. rubbed his hand on Morton's head and stated that Morton's hair felt like carpet. [Morton Dep., p. 133; Desmond Aff., ¶ 13; Desmond Aff., Ex. B]. Morton reported both of these incidents to Desmond at the same time. According to Desmond's notes regarding his investigation, IMP required Smith, Sr. to apologize to Morton. Smith, Jr. was reprimanded for touching others.[3] [Desmond Aff., ¶¶ 12-13; Desmond Aff., Ex. B.]. After Morton reported the washroom incident, Smith, Sr. never made another racially derogatory remark to Morton. [Morton Dep., p. 137].

On October 10, 2001, Morton filed his first charge of discrimination with the City of Indianapolis, Division of Equal Opportunity. [Def.'s Ex. 4]. Morton's charge mentioned the washroom incident with Smith, Sr. In addition, Morton alleged that he had been "reprimanded for taking time off that he was entitled to" and that other Caucasian coworkers took the same day off but were not reprimanded. [Def.'s Ex. 4]. With respect to the missed day, Morton was paid for a sick day but given an attendance point. In addition, Morton claims that Desmond "took [his] bonus that [he] would have got." [Morton Dep., p. 177]. Scott Clemons, IMP's Production/Engineering Manager, denied Morton's request for time off because "too many people were off that day and Johney Morton

[3]Desmond concluded that Smith, Jr. had also touched several other employees. However, there is no indication in the record concerning the race of these employees.

had used up all of his vacation days." [Clemons Aff., ¶¶ 3, 9].

In November 2001, while Morton was working as a machine operator, a coworker delivered a skid to Morton's machine. Morton saw what he believed to be a swastika drawn on the skid. [Morton Dep., p. 160; Clemons Aff., ¶ 5; Clemons Aff., Ex. B]. Morton complained to Doug Harris that he believed Glen Dale Smith ("Dale Smith") drew the swastika on the skid. Harris and Clemons investigated Morton's complaint and together interviewed Dale Smith about the skid. [Clemons Aff., ¶ 5; Clemons Aff., Ex. B]. According to Clemons' memo regarding the investigation, Harris saw the skid and "indicated that it looked like an 'X' and could have been a swastika."[4] [Clemons Aff., Ex. B]. In addition, "Dale [Smith] stated that the mark was not a swastika, but a marking he put on the skid to indicate they were complete." [Clemons Aff., Ex. B]. In any event, Clemons warned Dale Smith that the mark "could be inflammatory and insensitive to a lot of people" and not to draw any symbol that could be construed as a swastika in the future. [Clemons Aff., Ex. B].

In February 2002, IMP learned of another incident involving Smith, Jr. and Morton. Desmond and Clemons conducted an investigation and determined that, on February 11, 2002, Smith, Jr. had

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[4]D-Z's factual submission on this point leaves something to be desired. For example, citing to Clemons' memo regarding the investigation of the incident, D-Z submits that "Doug Harris thought the alleged swastika looked like an "X." [Docket No. 22, p. 11]. The memo actually states, "Doug saw the mark and indicated that it looked like an "X" and could have been a swastika. He is not certain what a swastika looks like." [Clemons Aff., Ex. B] (emphasis added). D-Z also misquotes Morton's deposition in its brief on summary judgment. Citing page 104 of Morton's deposition, D-Z claims that "Nick" stated that "they are still lynching people" in Mooresville. [Docket No. 22, p. 5]. According to Morton's deposition, "Nick" stated, "They're still lynching black people out there." [Morton Dep., p. 104] (emphasis added). Inaccurate and/or incomplete record citations such as these are not well taken.

used the racial slur "G-Nigger" while speaking with Morton.[5] [Desmond Aff., ¶¶ 14-15; Desmond Aff., Ex. C; Clemons Aff., ¶ 6; Clemons Aff., Ex. C]. As a result, IMP suspended Smith, Jr. for one day, noting that future occurrences of racial insensitivity would lead to further discipline, including possible termination. [Desmond Aff., ¶ 14; Clemons Aff., ¶ 7; Clemons Aff., Ex. D].

On February 12, 2002, Morton and his wife met with Desmond, Clemons and Harris to discuss Morton's account of the incident with Smith, Jr. At the conclusion of the meeting, Morton resigned his employment with IMP. [Clemons Aff., ¶ 8; Clemons Aff., Ex. E]. Thereafter, on February 14, 2002, Morton filed a second charge of discrimination with the City of Indianapolis, Division of Equal Opportunity, regarding the confrontation with Smith, Jr. and IMP's alleged failure to take action. [Def.'s Ex. 5].

Finally, on August 8, 2002, Morton filed a charge of discrimination with the Equal Employment Opportunity Commission claiming discrimination and harassment based on race and retaliation. In this charge, Morton outlines several instances of harassment and/or discrimination, including: (1) Smith, Jr.'s "G-Nigger" comment; (2) an allegation that someone told him that "his black ass should be hung from a tree"[6]; (3) Smith, Sr.'s comment in the washroom; (4) an allegation that Smith, Jr. spit in Morton's face while chewing tobacco[7]; (5) the swastika on the skid; (5) the police questioning Morton regarding the

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[5]Morton testified that he heard the slur "nigger" one other time during his employment with IMP. However, in that instance, the slur was not directed at Morton. [Morton Dep., p. 167].

[6]There is no evidence that Morton reported this comment to D-Z. In fact, other than Morton's charge, the Court finds no other evidence in the record regarding this alleged statement.

[7]In his deposition, Morton testified that Smith, Jr. "didn't hawk and spit in my face, no." [Morton Dep., p. 152]. Instead, Morton alleges that Smith, Jr.'s saliva hit him in the face while Smith, Jr. was yelling at Morton. [Morton Dep., pp. 151-52].

theft of copper and Desmond's comment regarding "you people"; and (6) Morton's alleged demotion as second shift supervisor. [Def.'s Ex. 6].

B. Procedural History.

D-Z served Morton with its first set of interrogatories and first request for production of documents on May 8, 2003. Accordingly, without an extension, Morton's discovery responses were due on June 10, 2003. Fed. R. Civ. P. 6(e), 33(b)(3), and 34(b). Morton's counsel did not seek an extension of time from either the Court or D-Z's counsel prior to this deadline.

Morton is a member of the National Guard and on June 11, 2003, he was called to active duty. Shortly thereafter on June 25, 2003, the Court held an initial pretrial conference. At that pretrial, Morton's counsel represented to the Court that Morton was serving overseas in the National Guard and that responding to discovery would, therefore, be somewhat difficult. Indeed, according to the parties' proposed Case Management Plan ("CMP"), "[a]t the time of the preparation of this Case Management Plant [sic], the Plaintiff is serving in Iraq and the return date is not known at this time." [Docket No. 11, p. 5].

According to the deadlines set by the CMP, the parties were to "serve their Fed. R. Civ. P. 26 initial disclosures on or before July 20, 2003 and shall at that time file a notice with the Court that such disclosures have been served." [Docket No. 13, p. 4]. In addition, Morton was to file his preliminary witness and exhibit lists on or before July 20, 2003. [Id.]. To date, Morton has yet to complete either of these Court-ordered tasks.[8]

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[8]Referring to Morton's initial disclosures and preliminary lists, D-Z accurately notes that "Plaintiff failed to file either of these documents." [Docket No. 18, p. 6]. From the record, Morton's

Throughout the pendency of this matter, Morton's counsel has unwaveringly maintained that Morton was unavailable to participate in discovery due to his overseas deployment in the National Guard. For example, Morton's counsel, in a letter to D-Z's counsel dated August 15, 2003, stated "[a]s you are aware, Plaintiff, Johney Morton, is on active Military duty over seas [sic] fighting for our freedom." [Docket No. 18, Bates No. 17]. Shortly thereafter during a telephonic status conference on September 4, 2003, Morton's counsel again represented to the Court that Morton was overseas in active military service. [Docket No. 15]. As a result of this representation, the Court scheduled a subsequent status conference for December 19, 2003 to discuss the "possibility of administratively closing this case in the event that [Morton's] return date is unknown or not in the foreseeable future." [Id.]. At that conference, Morton's counsel once again referenced Morton's overseas military duty, but noted that he was on temporary furlough in the United States.[9] Therefore, the case remained on the Court's active docket and the parties scheduled Morton's deposition for December 30, 2003. [Docket No. 16]. In addition, as a result of the delay, the Court enlarged the time to file dispositive motions to February 20, 2004. [Id.].

D-Z's counsel deposed Morton on December 30, 2003 without the benefit of Morton's

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failure to adhere to the CMP deadlines appears inexcusable as Morton has not offered any explanation or otherwise requested relief from these deadlines. However, in fairness to Morton, D-Z is not without tarnish. For example, D-Z's notice of initial disclosures was filed on July 29, 2003 -- nine days beyond the deadline. In addition, D-Z's preliminary witness and exhibit lists were due on or before August 20, 2003. [Docket No. 13, p. 4]. To date, D-Z has also failed to file its preliminary lists. Morton's failure to comply with his earlier deadline does not, without Court order, relieve D-Z of its obligation to meet CMP deadlines.

[9]In a letter to D-Z's counsel dated December 12, 2003, Morton's counsel indicated that his client "will be in Indiana on December 13, 2003 and will be leaving on January 1, 2004." [Docket No. 18, Bates No. 24].

discovery responses. Prior to that time, D-Z's counsel inquired as to the status of Morton's discovery responses and requested that Morton provide them prior to his deposition. Specifically, in a letter to Morton's counsel dated October 21, 2003, D-Z's counsel stated:

> While your client is stationed overseas, it was my hope that at least some of the information could be provided. I understand from our last status conference with Judge Baker that there is a possibility that your client will be returning to the United States some time near the holidays. I would like to take his deposition at that time and would anticipate having discovery responses prior to the deposition.

[Docket No. 18, Bates No. 22]. Additionally, on December 15, 2003, in anticipation of Morton's December 30 deposition, counsel for D-Z faxed to Morton's counsel copies of the original discovery requests served on May 8, 2003. [Docket No. 18, Bates No. 25]. All to no avail. Morton did not respond to D-Z's discovery requests until February 19, 2004 -- one day before the expanded summary judgment deadline and over nine months from their original service. [Docket No. 28].

Morton's deposition proved enlightening. Despite Morton's counsel's numerous representations to the contrary, Morton never left Indiana during his National Guard service. During the time between his active duty activation and his deposition, Morton was stationed either at Camp Atterbury, located in Edinburgh, Indiana, or Newport, Indiana -- both of which are located within the Southern District of Indiana. [Morton Dep., pp. 11, 24]. While on active duty, Morton was able to communicate with civilians through his cell phone and written correspondence. [Morton Dep., p. 24]. In addition, the military allowed for "squad nights out" where Morton visited the local town. [Id.]. Also during this period, Morton traveled home "about five times" on leaves varying in length between two and three days. [Morton Dep., p. 26]. Morton testified that he could receive mail -- and in fact,

did receive mail from his family -- while stationed at either Camp Atterbury or Newport. [Morton Dep., p. 126]. Finally, Morton testified that he never received copies of D-Z's interrogatories while on active duty. [Morton Dep., p. 24]. In fact, Morton first learned that D-Z had served discovery requests "about a week" before his deposition. [Morton Dep., p. 123].

On February 11, 2004, D-Z filed its Motion to Dismiss or Alternatively for Sanctions based, in large part, on the facts outlined above. [Docket No. 17]. On February 25, 2004, Morton responded with a motion to strike[10] claiming, among other things, that D-Z "failed to follow the established procedure in this circuit that would allow the Court to consider sanctions," that "[t]here is no evidence of bad faith, willfulness, or fault on the part of Plaintiff or Counsel for the Plaintiff," and that D-Z's motion contains classified information." [Docket No. 28, pp. 1-2]. The matter is now fully briefed and ready for disposition by the Court.

In addition to the issues presented by D-Z's motion to dismiss, several other matters are ripe for disposition. On February 20, 2004, D-Z timely filed its motion for summary judgment. [Docket No. 21]. Thereafter, Morton requested an extension of time to respond to D-Z's summary judgment motion to and including April 22, 2004. [Docket No. 35]. The Court granted the motion, but limited the extension to April 16, 2004. [Docket No. 36]. Morton missed this deadline and filed his opposition to D-Z's motion for summary judgment on April 21, 2004. [Docket No. 38]. Morton's tardiness resulted in a slew of motions, including four additional motions by Morton that seek to amend,

[10]Although captioned as a separate motion, the Court views Morton's motion to strike as a response in opposition to D-Z's motion to dismiss. To the extent it is intended otherwise, it is DENIED.

add or substitute information to his already late opposition to summary judgment. [See Docket Nos. 40, 42, 43, 44]. In addition, on April 26, 2004, D-Z filed a motion to strike Morton's belated opposition to summary judgment. [Docket No. 41].

Finally, the Court held a telephonic status conference on April 8, 2004. Morton's counsel failed to appear at the conference and the Court ordered counsel to show cause why sanctions should not issue for such failure. [Docket No. 37]. On April 28, 2004, Morton's counsel filed his response to the Court's show cause order. That matter is also ripe for disposition.

III. Discussion.

A. D-Z's Motion to Dismiss or Alternatively for Sanctions.

In its motion, D-Z does not specify what rule or rules it is relying on in pursuing dismissal or sanctions against Morton. Instead, D-Z simply states that it filed its motion "pursuant to applicable federal rules," leaving the Court to determine what standard applies to this particular situation. [Docket No. 17, p. 1]. The Seventh Circuit has described the varying standards as follows:

> Looking at the case law, we find two different standards for determining whether a case can properly be dismissed. Some of our cases have held that actions can be dismissed "when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing." Williams v. Chicago Bd. of Educ., 155 F.3d 853, 857 (7th Cir. 1998); Schilling v. Walworth County Park & Planning Com'n, 805 F.2d 272, 278 (7th Cir. 1986). This appears to be the standard used when cases are dismissed for want of prosecution or failure to comply with orders of the court, Fed. R. Civ. P. 41(b). A slightly different requirement -- a finding of willfulness, bad faith or fault -- comes into play when dismissals are used specifically as a discovery sanction under Fed.R.Civ.P. 37. In re Golant, 239 F.3d 931, 936 (7th Cir. 2001); Langley v. Union Elec. Co., 107 F.3d 510, 514 (7th Cir. 1997); cf. In re Rimsat, Ltd., 212 F.3d 1039, 1046-47 (7th Cir. 2000) (requiring a finding of bad faith when a district court dismisses a case under the inherent powers of the court). That is, even without "a clear

> record of delay, contumacious conduct or prior failed sanctions," a court can apply the sanction of dismissal for Rule 37 violations with a finding of willfulness, bad faith or fault, as long as it first considers and explains why lesser sanctions would be inappropriate.

Maynard v. Nygren, 332 F.3d 462, 467-68 (7th Cir. 2003) (footnote omitted). Although some overlap exists between Rules 41(b) and 37(b), because the instant motion involves alleged abuses of the discovery process, the standard governing dismissal under Rule 37(b) is most applicable in deciding whether dismissal is appropriate. Id. at 467 n.2.

D-Z outlines several reasons for its request that Morton be sanctioned in this matter. For example, Morton failed to respond to D-Z's discovery requests within the time frame prescribed by Rules 33 and 34 of the Federal Rules of Civil Procedure. According to these rules, and allowing for the additional time permitted by Fed. R. Civ. P. 6(e), Morton's discovery responses were due no later than June 10, 2003 -- one day before Morton left for active duty. However, Morton's counsel neither requested an extension nor attempted to explain such failure to respond. In addition, Morton failed to serve his initial disclosures and file his preliminary witness and exhibit lists by the Court-ordered deadlines -- tasks he has yet to accomplish despite being put on notice by D-Z's motion to dismiss. Finally, and most troubling, Morton misrepresented, both to D-Z and the Court, his whereabouts during the period between June 11, 2003 and December 13, 2003.

Morton responded by requesting that the Court strike D-Z's motion "upon the grounds that counsel for the Defendant failed to follow the established procedure in this circuit that would allow the Court to consider sanctions as a method to force the Plaintiff to either comply with an order, or . . . to punish the Plaintiff for failing to follow the orders of the Court." [Docket No. 28, p. 1]. It is true that Local Rule 37.1 states that "[t]he Court may deny any discovery motion" unless the moving party

shows that a reasonably effort has been made to resolve the dispute. S.D. Ind. L.R. 37.1 (emphasis added). Technically, Morton is correct. D-Z violated this rule because it did not file "a separate statement" regarding this showing. However, the record before the Court makes clear that D-Z made numerous attempts to secure Morton's discovery responses before filing its motion. Furthermore, D-Z has adequately explained why it did not force the issue sooner, i.e. D-Z was under the false impression that Morton was out of the country serving in the National Guard. Therefore, Morton will not escape sanction merely on a technicality. Accordingly, the Court will determine the merits of D-Z's motion.

In all respects, Morton's response falls well short of adequately explaining the deficiencies outlined in D-Z's motion. Indeed, Morton's response highlights either an inability or unwillingness to comply with the mandates of the federal rules. Such disregard cannot be condoned by the Court. First, Morton does not offer any explanation for his failure to respond to D-Z's discovery requests within the 30 days prescribed by Rules 33 and 34. Morton's call to active duty did not occur until after this time period had expired and, therefore, cannot serve as an excuse for the tardy responses. In fact, as Morton's testimony illustrates, Morton's counsel did not even make Morton aware of D-Z's discovery requests until late December 2003 -- over seven months after they were originally served. Morton's counsel's idleness in this regard is inexcusable.

Morton seems to argue that because D-Z now has his discovery responses, D-Z has not been prejudiced and, therefore, no sanction should issue. However, D-Z deposed Morton without the benefit of Morton's discovery responses. See Carter v. IPC International, Corp., 208 F.R.D. 320, 322 (D. Kan. 2002) ("Defendants have been prejudiced in that they have been forced to depose plaintiffs without the benefit of the discovery responses at issue."). Whether Morton is deposed a

second time, as Morton suggests, does not lessen this prejudice (actually potential prejudice, since as discussed below summary judgment is appropriate). This is especially true given the fact that Morton's discovery responses came one day before the summary judgment deadline. Moreover, based upon a reasonable interpretation of the record, it appears that Morton finally responded to D-Z's discovery requests only in response to D-Z's motion for sanctions.[11]

Fantastically, Morton claims that "Plaintiff never violated a court's order," and that "the Court has never ordered the Plaintiff to comply with the Defendant's discovery request." [Docket No. 28, pp. 3-4]. Morton is mistaken. The Court approved the parties' CMP on June 25, 2003. [Docket No. 13]. Among other things, the CMP ordered Morton to serve his "Fed. R. Civ. P. 26 initial disclosures on or before July 20, 2003" and to file his "preliminary witness and exhibit lists on or before July 20, 2003." [Docket No. 13, p. 4]. Morton did neither. Despite Morton's apparent belief to the contrary, the CMP, once approved by the Court, is an order of the Court. Furthermore, Morton violated Rules 33 and 34 of the Federal Rules of Civil Procedure by failing to respond to D-Z's discovery requests within the specified time. Morton goes so far as to state that "the Court has never ordered him to participate in the discovery process and he failed to comply." [Docket No. 28, p. 4]. Morton misses the point. In addition to any orders issued by the Court, the Federal Rules of Civil Procedure govern discovery and require Morton to "participate in the discovery process." Morton's

[11]At the completion of Morton's December 30, 2003 deposition, D-Z again requested Morton's discovery responses. [Morton Dep., p. 197]. On January 19, 2004, D-Z's counsel reiterated this request via letter to Morton's counsel. [Docket No. 18, Bates No. 29]. However, Morton did not respond to D-Z's discovery requests until February 19, 2004, after D-Z's motion for sanctions.

arguments are unavailing.

Perhaps most disturbing are counsel's misrepresentations of Morton's whereabouts from approximately June 11, 2003 through December 13, 2003. Throughout this period, Morton's counsel maintained that Morton was overseas on active duty in the National Guard. Yet, when Morton's deposition finally occurred on December 30, 2003, Morton testified that he had never left Indiana. Additionally, while on active duty, Morton was able to communicate with civilians -- presumably his attorney included -- through his cell phone and written correspondence. Morton could receive mail while on active duty. He visited the local town on "squad nights out" and traveled home "about five times" on leaves varying in length between two and three days.

In response to D-Z's motion -- and Morton's enlightening testimony -- Morton's counsel states:

> Counsel has drawn an inference from the testimony of the Plaintiff in the deposition that Counsel for the Plaintiff knew that his client was located within the country and avoided answering the interrogatories and producing the documents on purpose and with the intent to delay the progress of this lawsuit. The Plaintiff vehemently objects to this inference, and in response pleads to the Court that Plaintiff's whereabouts was classified information.

[Docket No. 28, p. 3 (citation omitted)]. Additionally, Morton asserts that "[c]ounsel for the Plaintiff categorically denies having any prior knowledge of the Plaintiff's whereabouts before December 30, 2003. Therefore, the obligation to answer the interrogatories and to produce the documents in a timely manner was stayed."[12] [Docket No. 28, p. 5]. In the Court's view, Morton's counsel's actions in this

[12]Even if it were true that Morton was overseas and unavailable to participate in discovery, the proper course would be to move the Court to stay or extend discovery and other deadlines. Morton's counsel is incorrect to assume that "the obligation to answer the interrogatories and to produce the documents in a timely manner was stayed" without leave of Court.

regard were either intentional misrepresentations to the Court, or a complete lack of reasonable diligence/inquiry by counsel. Either way, such conduct demonstrates bad faith and is unacceptable.

Additionally, Morton's counsel's misrepresentations were not without consequence. They delayed discovery, unnecessarily extended deadlines, and potentially prejudiced D-Z, in that D-Z was forced to take Morton's deposition and draft its summary judgment motion without the benefit of Morton's long-overdue discovery responses. Perhaps the misrepresentations occurred because of a communication breakdown between Morton and his counsel. However, as Morton's testimony illustrates, Morton was not incommunicado with the civilian world.[13] Morton could have easily contacted his attorney to inform him of his current location and inquire about his lawsuit -- and vice versa. In short, Morton's counsel's failure to adequately communicate with his client does not excuse repeated misrepresentations made to the Court.

Although the Court believes dismissal under Rule 37 too severe in this case, sanctions are nonetheless appropriate. As the Seventh Circuit has noted:

> The Supreme Court ruled in Chambers v. NASCO, Inc., 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed.2d 27 (1991), that a district court has the inherent power to "fashion [ ] appropriate sanction[s] for conduct which abuses the judicial process." Id. at 44, 111 S. Ct. at 2133. This power exists even where procedural rules govern the same conduct. Id. at 49, 111 S. Ct. at 2135.

Kovilic Const. Co., Inc. v. Missbrenner, 106 F.3d 768, 772 (7th Cir. 1997). In Chambers, the

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[13]Morton's argument that his whereabouts were classified and a matter of national security is, quite simply, without merit. The Court agrees with D-Z that "under Executive Order 12356, the whereabouts of Johney Morton would likely not be the kind of information considered classified or in any way compromising the national security interests of the United States." [Docket No. 29, p. 5]. This is especially true given Morton's testimony that he was allowed "squad nights out," traveled home approximately five times during his active duty, sent and received mail and made cell phone calls to civilians.

Supreme Court found that "'[t]here are ample grounds for recognizing . . . that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel.'" Chambers, 501 U.S. at 45, quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980). Specifically, Chambers found that:

> a court may assess attorney's fees when a party has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" In this regard, if a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled," it may assess attorney's fees upon the responsible party, as it may when a party "shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order."

501 U.S. at 45-46 (internal citations omitted). Morton's counsel's actions satisfy this threshold and sanctions are appropriate under the inherent powers of the Court.

In making this determination, the Court notes that:

> when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

Chambers, 501 U.S. at 50. Morton's counsel's actions do not fall neatly within those Federal Rules that allow for sanctions. See Fed. R. Civ. P. 11, 16(f), 26(g), 37. Nonetheless, the Court finds that Morton's counsel's misrepresentations to the Court demonstrate bad faith and warrant sanctions. Therefore, the Court relies on its inherent power to do so.

In its motion requesting sanctions, D-Z seeks dismissal or, alternatively, an order requiring Morton to respond to discovery, an order requiring Morton to pay for court reporting fees for the December 30, 2003 deposition, an order requiring Morton's appearance at a second deposition, and an order requiring Morton to pay D-Z "for all costs and expenses incurred in the pursuit of discovery

responses upon a showing of the costs and expenses incurred and the reasonableness thereof and for costs incurred in the filing of this Motion and the accompanying Brief." [Docket No. 17, pp. 3-4]. Given the Court's ruling on D-Z's summary judgment explained in detail below, much of D-Z's requested relief is moot. However, the Court finds that D-Z's request for cost and expenses, including attorney's fees, incurred in pursuing Morton's discovery responses and in filing its motion for sanctions is appropriate. Accordingly, D-Z shall file any affidavits or other support for an award of fees/costs within twenty days from the date of this entry. Any response shall be filed ten days thereafter, and any reply shall be filed seven days thereafter.

B. D-Z's Motion to Strike Morton's Summary Judgment Response.

D-Z filed its timely motion for summary judgment on February 20, 2004. Accordingly, Morton's response was due 33 days thereafter, or March 24, 2004. S.D. Ind. L.R. 56.1; Fed. R. Civ. P. 6(e). One day after this deadline passed, Morton belatedly filed a motion requesting until April 22, 2004 to file his response to D-Z's summary judgment motion. Morton neither provided explanation for his request, nor notified the Court of the tardiness of his motion. [Docket No. 35]. Nonetheless, the Court granted Morton a limited extension to April 16, 2004. [Docket No. 36].

Morton, however, once again let the deadline to respond to D-Z's motion pass. On April 21, 2004, without reference to its overdue status, Morton filed his response to D-Z's motion for summary judgment. Not surprisingly, D-Z filed a motion to strike Morton's late response citing numerous examples of Morton's failure to meet deadlines during the pendency of this matter. These examples include: (1) Morton's failure to serve initial disclosures; (2) Morton's failure to timely respond to D-Z's discovery requests; (3) Morton's motion to extend time to respond to summary judgment after the

deadline had expired; and (4) Morton's counsel's failure to appear at the Court's April 8, 2004 telephonic status conference.

Morton responded to D-Z's motion to strike on two fronts: (1) he filed an opposition to D-Z's motion to strike[14] [Docket No. 46] and (2) a belated motion for extension of time. [Docket No. 47]. Morton's arguments in both are similar and neither is compelling. Morton argues that "[t]he Plaintiff's counsel, through in advertence [sic], responded to said Motion for Summary Judgment as though Magistrate Judge had granted the extension to and including April 22, 2004." [Docket No. 47]. In essence, Morton's counsel admits that he either did not read the Court's order or that he ignored it. Morton's argument fails to provide good cause to allow the extension.

Federal Rule of Civil Procedure 6(b)(2) provides:

> **(b) Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .

Thus, the Court must decide whether Morton's failure to act falls within the definition of "excusable neglect." For the reasons that follow, the Court finds that it does not.

In the Rule 6(b) context, the Supreme Court has stated that: "Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to

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[14]Morton titled his opposition "Plaintiff's Response to Defendant's Motion to Dismiss." [Docket No. 46]. However, it is apparent from the body of this filing that it is in response to D-Z's motion to strike and not D-Z's motion to dismiss.

omissions caused by circumstances beyond the control of the movant." Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 392 (1993) (footnote omitted). Thus, this "elastic concept" may include, under appropriate circumstances, neglect due to simple, faultless omissions to act or carelessness. Id. at 388. "In other words, mere inadvertence, without more, *can* in some circumstances be enough to constitute 'excusable neglect' justifying relief under Rule 6(b)(2). Raymond v. International Business Machines Corp., 148 F.3d 63, 66 (2nd Cir. 1998). This is not, however, one of those circumstances.

The determination of whether Morton's neglect is "excusable" is ultimately "an equitable one, taking account of all relevant circumstances surrounding the party's omission." Pioneer, 507 U.S. at 395. Those factors include evaluating the danger of prejudice to D-Z, the non-moving party, the length of delay and its potential impact on the Court's proceedings, the reason for the delay, including whether the delay was in Morton's control, and whether Morton acted in good faith. Id. See also Jovanovic v. In-Sink-Erator Division of Emerson Electric Co., 201 F.3d 894, 897 (7th Cir. 2000) (applying Pioneer factors to court's denial of request for an extension of time). Although the danger of prejudice to D-Z is slight given the Court's ruling on summary judgment, the remaining factors weigh against Morton.

Morton's counsel's "inadvertence" was certainly within his control and no other reason has been offered for missing the Court-ordered deadline. This is not a case of a "simple, faultless omission," but a willful disregard of the Court's authority. According to Morton's counsel, he believed he had filed Morton's opposition one day before the deadline of April 22, 2004. Morton's counsel assumed that the Court rubber-stamped his request for an extension of time, notwithstanding the fact that he filed it late and failed to provide any justification for the request. In other words, it is clear that

Morton's counsel did not actually read the Court's order regarding Morton's request for extension. Had he done so, it would have been immediately apparent that the Court extended the deadline only to April 16. This situation cannot be classified as "mere inadvertence" or carelessness. In short, Morton's counsel did not act in good faith.

As the Seventh Circuit has aptly stated:

> We live in a world of deadlines. If we're late for the start of the game or the movie, or late for the departure of the plane or the train, things go forward without us. The practice of law is no exception. A good judge sets deadlines, and the judge has a right to assume that deadlines will be honored. The flow of cases through a busy district court is aided, not hindered, by adherence to deadlines.

Spears v. City of Indianapolis, 74 F.3d 153, 157 (7th Cir. 1996). See also Reales v. Consolidated Rail Corp., 84 F.3d 993, 996 (7th Cir. 1996) ("[Courts] are entitled -- indeed they must -- enforce deadlines. Necessarily, they have substantial discretion as they manage their dockets."). Accordingly, D-Z's motion to strike Morton's response to D-Z's motion for summary judgment [Docket No. 41] is GRANTED. Morton's belated motion for extension of time [Docket No. 47] is DENIED.[15]

C. D-Z's Motion for Summary Judgment.

As a result of the Court's order with respect to D-Z's motion to strike, D-Z's motion for summary judgment is unopposed. However, this fact does not automatically entitle D-Z to summary judgment in its favor.

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[15]For the same reasons recited in this section, Morton's motion to amend his response to D-Z's statement of material facts [Docket No. 40], Morton's second motion to amend his response to D-Z's statement of material facts [Docket No. 42], Morton's motion to file index [Docket No. 43], and Morton's motion to substitute exhibit [Docket No. 44] are DENIED.

> Rule 56(e) provides that if the adverse party does not respond to the motion, summary judgment shall be entered "if appropriate" -- that is, if the motion demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. There are plenty of sanctions for untimely filings, but granting summary judgment is not one of them.

Tobey v. Extel/JWP, Inc., 985 F.2d 330, 332 (7th Cir. 1993). See also Reales, 84 F.3d 993, 997 (7th Cir. 1996) (granting of summary judgment is not a proper sanction for untimely submissions). However, to the extent the facts claimed by D-Z and supported by admissible evidence are uncontroverted and do not allow for reasonable inferences to be drawn in Morton's favor which preclude summary judgment, those facts will be deemed admitted. S.D. Ind. L.R. 56.1. With this standard in mind, the Court turns to D-Z's motion for summary judgment.

Morton's claims fall into three categories: discrimination, retaliation, and harassment. D-Z claims, for varying reasons, that it is entitled to judgment as a matter of law on each of Morton's claims. For the reasons cited below, the Court agrees.

1. Race Discrimination.

Under Title VII, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). In addition, "[d]iscrimination claims under both Title VII and § 1981 are analyzed in the same manner." Patton v. Indianapolis Public School Bd., 276 F.3d 334, 338 (7th Cir. 2002). Accordingly, the Court considers Morton's Title VII and § 1981 claims concurrently.

In this case, despite the comments by his co-workers, Morton does not offer direct evidence of discrimination. See Davis v. Con-Way Transp. Central Express, Inc., 368 F.3d 776, 784 (7th Cir.

2004) ("Any examples of allegedly discriminatory treatment by coworkers is wholly irrelevant to the mosaic, as his coworkers had nothing to do with the decision to terminate his employment."); Johnson v. Cambridge Indus. Inc., 325 F.3d 892, 896 (7th Cir. 2003) ("In spite of the alleged racist comments from certain co-workers, Johnson lacks direct evidence of race discrimination . . . ."). Therefore, Morton must proceed under the familiar indirect, burden-shifting approach. Rhodes v. Illinois Dept. of Transp., 359 F.3d 498, 504 (7th Cir. 2004), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Morton satisfies his prima facie burden, the burden shifts to D-Z to articulate a non-discriminatory reason for its actions. Rhodes, 359 F.3d at 504. However, the Court need not decide whether Morton satisfied his prima facie case because Morton fails to establish pretext. See EEOC v. Our Lady of the Resurrection Med. Ctr., 77 F.3d 145, 149 (7th Cir. 1996) ("court may advance to an ultimate issue in a summary judgment analysis and consider the discrimination question notwithstanding a dispute over a fact necessary for a prima facie case.") (and cases cited therein).

Although a majority of Morton's allegations center on claims of racial harassment, Morton also asserts that he was unlawfully demoted on the basis of his race when he was moved from second shift working foreman to assistant machine operator on first shift. In response, D-Z states that it terminated its second shift due to business reasons and that everyone on that shift, regardless of race, was affected. [Docket No. 22, pp. 13-14]. Further, D-Z claims that it placed Morton in an assistant operator position because, at the time, no operator positions were available. Finally, Morton continued to be paid his management stipend even after the transfer to first shift. [Docket No. 22, p. 14]. Based on these facts, D-Z satisfied its burden to articulate a non-discriminatory reason for Morton's transfer to first shift and placement in the assistant operator position. Therefore, the burden shifts back to Morton

to demonstrate that there remains a material issue of fact regarding pretext.

Morton can defeat D-Z's motion for summary judgment on the issue of pretext by producing evidence that calls into question the D-Z's stated reason for Morton's transfer. "This means the plaintiff must show by a preponderance of the evidence that the proffered explanation is false and that 'discrimination was the real reason' for the adverse employment action." Volovsek v. Wisconsin Dept. of Agr., Trade and Consumer Protection, 344 F.3d 680, 692 (7th Cir. 2003), quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515 (1993). However, as D-Z points out, "Morton offers no evidence whatsoever that the discontinuation of the second shift was for anything but legitimate reasons." [Docket No. 22, p. 13]. Accordingly, because Morton fails to establish pretext, D-Z's motion for summary judgment on this issue is GRANTED.

2. Retaliation.

Morton fares no better on his retaliation claim. The Seventh Circuit recently reiterated the methods of proof for a retaliation claim as follows:

> The plaintiff may establish a prima facie case of retaliation and overcome defendant's motion for summary judgment using either the direct method or the indirect method. Under the direct method, the plaintiff must present direct evidence of (1) a statutorily protected activity; (2) an *adverse employment action* taken by the employer; and (3) a causal connection between the two. Under the indirect method, the plaintiff must show that (1) she engaged in a statutorily protected activity; (2) she performed her job according to her employer's legitimate expectations; (3) despite her satisfactory job performance, she suffered an *adverse action from the employer;* and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity.

Williams v. Waste Management of Illinois, 361 F.3d 1021, 1031 (7th Cir. 2004). Although it is not entirely clear what specific actions Morton is claiming as retaliatory, it is clear from the record that

under either method of proof, Morton's claim fails.

Under the direct method, there is no evidence in the record of a causal connection between Morton's protected activity and any action he claims adverse. Additionally, under either method, none of the actions complained of in Morton's charges constitute an adverse action under Title VII or § 1981. What constitutes an adverse action is not rigidly defined. However, the Seventh Circuit has described the analysis as follows:

> Determining what is materially adverse will normally "depend on the facts of each situation." Bryson v. Chi. State Univ., 96 F.3d 912, 916 (7th Cir. 1996). A wide variety of actions can qualify, "some blatant and some subtle." Id. at 916 (citation omitted). While what is considered adverse is defined broadly, "not everything that makes an employee unhappy is an actionable adverse action." Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996); but see Collins v. State of Ill., 830 F.2d 692 (7th Cir.1987) (holding that an "adverse job action is not limited solely to loss or reduction of pay or monetary benefits"). In assessing adversity, we may examine both quantitative and qualitative changes in the terms or conditions of plaintiff's employment. See Dahm v. Flynn, 60 F.3d 253, 257 (7th Cir. 1994).

Haugerud v. Amery School Dist., 259 F.3d 678, 691 (7th Cir. 2001).

A review of the record reveals that Morton complains of: (1) his alleged demotion from his second shift foreman position; (2) the assessment of a point for missing a day of work; (3) being questioned by the police; and (4) approximately seven instances of coworkers' offensive comments or actions over the course of Morton's employment -- approximately five and one-half years. With respect Morton's alleged demotion, Morton did not take a pay cut in moving from the second shift foreman position to the first shift assistant operator position. [Morton Dep., p. 72]. Moreover, Morton's move resulted from the discontinuation of the second shift and IMP placed him as an assistant operator because there were no open operator positions. Under these facts, the Court finds that

Morton did not suffer an adverse action by transferring to first shift. Even assuming, however, that such transfer equates to an adverse action under Title VII, Morton has failed to proffer evidence from which a reasonable person could conclude that IMP's stated reasons for the transfer were false. In short, IMP did not retaliate against Morton for engaging in protected activity by transferring him to first shift.

Likewise, IMP's assessment of an attendance point against Morton for missing a day of work falls well short of qualifying as an actionable adverse action. Morton testified that IMP paid him for a sick day, despite the assessment of the attendance point. [Morton Dep., p. 177]. Oral or written reprimands, without a corresponding tangible job consequence, simply do not rise to the level of an adverse employment action.[16] Oest v. Illinois Dept. of Corrections, 240 F.3d 605, 613 (7th Cir. 2001). See also Sweeney v. West, 149 F.3d 550, 556 (7th Cir. 1998) ("Absent some tangible job consequence accompanying [the] reprimands, we decline to broaden the definition of adverse employment action to include them.").

Finally, similar to the attendance point, Morton's questioning by the police was not accompanied by a tangible job consequence and cannot be viewed as an adverse action. Moreover, even when viewed in conjunction with Morton's other complaints regarding his coworkers' inappropriate behavior, as explained more fully below, the sum total of Morton's complaints do not rise to the level of creating an actionable hostile work environment. In short, Morton has failed to establish a prima facie case of retaliation. Accordingly, D-Z's motion for summary judgment on Morton's

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[16]Morton's vague reference about also being denied a bonus does not, in this case, supply the requisite "tangible job consequence." [See Morton Dep., p. 177]. Other than Morton's single reference to this alleged denial in his deposition, the record is otherwise void regarding this allegation.

retaliation claim is GRANTED.

3. Hostile Work Environment.

To survive D-Z's motion for summary judgment on his racial harassment claim, Morton must show that: "(1) he was subject to unwelcome harassment; (2) the harassment was based on his race; (3) the harassment was severe or pervasive so as to alter the conditions of [Morton's] work environment by creating a hostile or abusive situation; and (4) there is a basis for employer liability." Williams v. Waste Management of Illinois, 361 F.3d 1021, 1029 (7th Cir. 2004). There is no question that Morton satisfies the first two elements. He was subjected to unwelcome harassment in the form of offensive remarks or behavior by his coworkers and at least some of the coworker comments were undeniably related to Morton's race. However, the final two elements of this equation require further scrutiny.

With respect to the third element, D-Z argues that "no reasonable finder of fact could conclude that Morton's work was so permeated with discriminatory conduct, ridicule and insult to justify a finding that the severity and pervasiveness altered the conditions of his employment." [Docket No. 22, p. 22]. Further, D-Z claims that many of the incidents that Morton complains of are time barred because Morton did not timely file a charge of discrimination. See Tinner v. United Insurance Co. of America, 308 F.3d 697, 707 (7th Cir. 2002) (noting 300-day filing period "when aggrieved person initially institutes proceedings with a state or local agency that has the power to grant relief in the situation."). D-Z is correct that many of these events fall outside the 300-day filing period. However, the Court need not determine whether Morton can establish a continuing violation or whether the harassment rose to the level of being either severe or pervasive. Considering all of Morton's

complaints and assuming that the harassment was sufficiently severe or pervasive, Morton cannot establish a basis for employer liability. Thus, his hostile work environment claim must fail.

"Employer liability is evaluated on two levels. First, an employer may be liable if a supervisor is responsible for the harassment. . . . Second, an employer may be liable if the harassment is done by a co-worker and the employer is shown to have been negligent in failing to prevent the harassment." Cooper-Schut v. Visteon Automotive Systems, 361 F.3d 421, 426 (7th Cir. 2004). Because this case involves only coworker harassment, D-Z "'can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring.'" Williams, 361 F.3d at 1029, quoting Tutman v. WBBM-TV, Inc./CBS, Inc., 209 F.3d 1044, 1048 (7th Cir. 2000). In this case, IMP satisfied its legal duty.

Each time Morton complained of or notified IMP of the alleged harassment, IMP took immediate and reasonable steps to deter harassment in the future. For example, when Morton reported "Nick's" comment about "this is how we used to do in the olden days," Desmond immediately investigated the incident and held an employee meeting to discuss IMP's harassment policy. Moreover, after the meeting, "Nick" ceased making harassing comments toward Morton.

Likewise, in late 2001, Morton again complained to Desmond regarding harassment, this time related to comments uttered by Smith, Sr. and Smith, Jr. Once again, Desmond immediately investigated. IMP required Smith, Sr. to apologize to Morton and reprimanded Smith, Jr. Thereafter, Smith, Sr. ceased making racially derogatory remarks toward Morton.

In November 2001, when Morton complained about what he perceived to be a swastika drawn on a skid, IMP again investigated and interviewed Dale Smith, the alleged culprit. Although

Dale Smith denied the allegation, claiming that the mark was instead an "X" marking a completed skid, Clemons warned Dale Smith regarding the "inflammatory and insensitive" nature of the mark prohibited such marks in the future.

Finally, when Smith, Jr. uttered the extremely offensive term "G-Nigger" in February 2002, IMP immediately took action by suspending Smith, Jr. for one day and warning that future occurrences would result in further discipline, including termination. Although Smith, Jr.'s 2001 reprimand ultimately did not prevent him from using highly inflammatory racially derogatory language in February 2002, whether IMP's actions were ultimately successful in preventing harassment is not the standard. As the Seventh Circuit has repeatedly stated:

> If an employer takes reasonable steps to discover and rectify the harassment of its employees ... it has discharged its legal duty. An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made. We are not to focus solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer's total response was reasonable under the circumstances as then existed.

Berry v. Delta Airlines, Inc., 260 F.3d 803, 811 (7th Cir. 2001), quoting McKenzie v. Illinois Dept. of Transp., 92 F.3d 473, 480 (7th Cir. 1996). Based on the facts of this case, the Court finds that D-Z reasonably responded to each situation. Accordingly, D-Z's motion for summary judgment on Morton's hostile work environment claim is GRANTED.

D. Constructive Discharge.

Morton's claim for constructive discharge fails for much the same reason as his hostile work environment claim. "Constructive discharge occurs when an employee's job becomes so unbearable that a reasonable person in that employee's position would be forced to quit." Williams, 361 F.3d at

1032. Based on the facts before the Court, Morton's situation does not meet this definition. As noted above, each time Morton reported incidents of harassment, IMP took reasonable action to rectify the matter. With respect to the Smith, Jr. incident that ultimately lead to Morton's resignation, Morton failed to allow IMP the chance to remedy the harassment. The Seventh Circuit has "noted that '[a]bsent extraordinary conditions, a complaining employee is expected to remain on the job while seeking redress [for Title VII violations].'" Cooper-Schut, 361 F.3d at 428 (citations omitted). Morton has not demonstrated any such "extraordinary conditions" and, therefore, his constructive discharge claim fails.

E. Order to Show Cause.

Finally, the Court turns to Morton's response to the Court's show cause order. Originally, by way of its March 24, 2004 order, the Court scheduled a telephonic status conference for March 31, 2004. [Docket No. 32]. Thereafter, due to a conflict in his schedule, counsel for D-Z filed a motion to continue the March 31 conference. [Docket No. 33]. The Court granted D-Z's motion and reset the conference for 2 p.m. on April 8, 2004. [Docket No. 34]. However, Morton's counsel failed to appear for the conference and the Court issued an order for Morton's counsel to show cause why sanctions should not issue for such failure. [Docket No. 37].

Pursuant to the Court's order, counsel responded to the show cause order on April 28, 2004. [Docket No. 45]. Counsel's response does not justify his absence. Instead, in a brief statement counsel writes that he was home on April 8, 2004, "which was the last day of his recuperating from surgery, and a phone was available to him." [Id.] (emphasis added). Additionally, counsel states that he "was not aware of the telephonic conference." [Id.]. Therefore, it is apparent that Morton's

counsel missed the status conference not because of his surgery, but because counsel -- once again -- failed to actually read (and abide by) an order of this Court. As noted above, counsel also failed to read the Court's order with respect to Morton's motion for an extension of time. Counsel's careless attitude toward this Court's orders provides no basis to avoid sanctions.

Accordingly, as a sanction for his failure to appear at the April 8, 2004 status conference, Morton's counsel is ordered to pay to D-Z's attorney an amount equal to D-Z's costs and expenses, including attorney's fees, for D-Z's attorney's preparation for and participation in the April 8 conference. See Fed. R. Civ. P. 16(f); Maynard v. Nygren, 332 F.3d 462, 470 (7th Cir. 2003) ("While fines are not specifically included in the non-exhaustive list of sanctions in Rule 37(b)(2), they are among the tools available to trial courts to remedy the harms of discovery violations."). D-Z shall file any affidavits or other support for an award of fees/costs within twenty days from the date of this entry. Any response shall be filed ten days thereafter, and any reply shall be filed seven days thereafter.

IV. Conclusion.

For the reasons stated above, the Court makes the following rulings: (1) D-Z's Motion to Dismiss or Alternatively for Sanctions [Docket No. 17] is DENIED to the extent D-Z seeks dismissal, and GRANTED as to other sanctions outlined above; (2) Plaintiff's Motion to Strike Defendant's Motion for Sanctions [Docket No. 28] is DENIED; (3) D-Z's Motion to Strike Plaintiff's Response to Defendant's Motion for Summary Judgment [Docket No. 41] is GRANTED; (4) Plaintiff's Motion to Amend Plaintiff's Response to Defendant's Statement of Material Facts [Docket No. 40] is DENIED; (5) Plaintiff's second Motion to Amend Plaintiff's Response to Defendant's Statement of Material Facts [Docket No. 42] is DENIED; (6) Plaintiff's Motion to File an Index [Docket No. 43] is DENIED; (7)

Plaintiff's Motion to Substitute Exhibit [Docket No. 44] is DENIED; (8) Plaintiff's Belated Motion for Extension of Time [Docket No. 47] is DENIED; and (9) D-Z's Motion for Summary Judgment [Docket No. 21] is GRANTED.

Pursuant to the Court's rulings on D-Z's motion for sanctions and the Court's show cause order, D-Z shall, within twenty days of this entry, file any affidavits or other support for an award of fees and/or costs. Any response shall be filed ten days thereafter, and any reply shall be filed seven days thereafter. Final judgment will be entered upon the determination of the exact monetary sanction. Costs shall be awarded to the Defendant.

SO ORDERED this _____ day of July, 2004.

Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

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